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No. 95-162

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,

Petitioner,

v.

STATE OF ARIZONA, and PAUL WADDELL, DIRECTOR OF THE ARIZONA DEPARTMENT OF REVENUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are states preempted from taxing retail sales of non-Indian goods to non-members of an Indian tribe by non-Indian retailers?

2. Is an otherwise valid state tax preempted because the state distributes part of the tax proceeds to its political subdivisions?

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SUPPLEMENTAL STATEMENT OF THE CASE

The Salt River Indian Reservation (Reservation) is located in the Phoenix metropolitan area, and is bordered by the cities of Scottsdale, Tempe and Mesa. The shopping mall at issue here, the Scottsdale Pavilions, was developed by a non-Indian developer. Most of the customers at the mall are non-Indians who reside outside the Reservation. Indeed, Petitioner, the Salt River Pima-Maricopa Indian Community (Community), has admitted that greater than 99% of the gross receipts from sales at the mall are attributable to goods or products brought to the mall from outside the Reservation, and the Community is unaware of any tangible personal property sold at the mall which is made on the Reservation.

Tenants at the mall include large national chains, such as J.C. Penney, Target, Circuit City, Sear's Home Life, Toys-R-Us, United Artist Theaters, McDonald's and Denny's, and many smaller retailers. The mall has been an enormous success, with annual gross receipts exceeding $200 million. Other than its retail location at the mall, none of the non-Indian tenants has any administrative, corporate, marketing, distribution or other activities within the Reservation. All of the non-Indian enterprises are managed by non-members of the Community, and none of the managers are residents of the Reservation.

The Community misstates the record when it asserts that the State does not furnish governmental services to the Reservation. Petition at 5. The court of appeals found that the "developer, the State, and the Community all provide services to the mall." *Salt River Pima-Maricopa Indian Community v. State of Arizona (Salt River)*, 50 F.3d

734, 735 (9th Cir. 1995), included in Petition at App. 1a-11a. The Community also misstates the record when it states it furnishes considerable services to the mall. Petition at 5. The record shows the Community's expenditures related to services at the mall are small compared to the Community's revenue from the mall. The court of appeals found that "to the extent that the Community has expended its resources on ancillary services at the mall, it appears that it has been more than adequately compensated through the 1 percent sales tax." *Salt River,* 50 F.3d at 738; Petition, App. 9a.

The record shows that the State and its political subdivisions maintain roads on the Reservation, including the roads providing access to the mall. Approximately 1000 Reservation children attend school at off-Reservation public schools supported by State and local taxes. The court of appeals also found that it "is undisputed that Arizona and its subordinate entities provide the governmental services used by the non-Indian purchasers off the reservation." *Salt River,* 50 F.3d at 735; Petition, App. 4a. *See Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 189 (1989) ("The relevant services provided by the State include those that are available to the lessees and the members of the Tribe off the reservation as well as on it.").

The Community filed an action challenging the State's imposition of a tax on the gross receipts of retail, restaurant and amusement businesses at the Scottsdale Pavilions, arguing that the State tax "interferes with the plaintiff's right to impose a just tax because it is impossible for Regulated Reservation Enterprises to pay sales

taxes at a rate higher than sales taxes imposed on comparable businesses located in Scottsdale, Tempe or Mesa which compete in the same market." Complaint, ¶VI. The Community also challenged these taxes because the State distributes a portion of its receipts to counties and cities pursuant to a statutory formula, but does not make similar distributions to Indian tribes.[1]

The district court and court of appeals each rejected the Community's claims, and upheld the imposition of the State tax on the non-Indian businesses.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT STATES ARE NOT PREEMPTED FROM TAXING RETAIL SALES TO NON-MEMBERS OF AN INDIAN TRIBE BY NON-INDIAN RETAILERS.

A. The Balance Of Interests Tips In The State's Favor When The Taxed Transactions Are Between Non-Indians And The Goods And Services Sold Are Non-Indian.

The Community argues that the court of appeals held "categorically" that sales of non-Indian products to non-Indians are taxable by a state. Petition at 6. The court of appeals did not apply such a test. Rather, the court of

[1] The Community also challenged the Arizona tax on rent receipts of the developer from its non-Indian tenants. This claim was rejected by both the district court and the court of appeals, and the Community does not challenge those rulings here.

appeals openly considered and recited the facts relating to the nature of the product transferred, the identity of the parties to the transactions, the governmental services available, and the federal and tribal interests at stake. It concluded:

> Applying these principles to the facts here, it is clear that the balance tips in favor of Arizona's taxation. Most importantly, the goods and services sold are non-Indian, and the legal incidence of Arizona's taxes falls on non-Indians. *See Colville*, 447 U.S. at 151, 100 S.Ct. at 2454 (citing *Moe*, 425 U.S. at 482, 96 S.Ct. at 1645). Furthermore, Arizona and its agents provide the majority of the governmental services used by these taxpayers. Consequently, the State's interest is at its strongest, not its weakest. *Id.*, 447 U.S. at 157, 100 S.Ct. at 2083.

Salt River, 50 F.3d at 737; Petition, App. 8a.

The Community's argument that the court of appeals failed to consider the federal and tribal interests in reservation economic development ignores the court's opinion. Citing this Court's decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), the court of appeals noted "that although Congress sought to foster tribal self-government and economic development, it had not gone so far as to preclude state taxation of sales by Indians to nonmembers of the tribe." *Salt River*, 50 F.3d at 737; Petition, App. 7a.

The Community's argument that the reasoning of *Colville* and similar cases only applies when a tribe seeks to market a tax exemption misreads those cases. This Court has recognized that a state tax "which falls on non-

Indian purchasers of goods merely retailed on a reservation – stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes.' " *Dept. of Taxation & Finance v. Milhelm Attea*, 114 S.Ct. 2028, 2035 (1994) (quoting *Colville*, 447 U.S. at 156-157).

Colville rejected preserving a tax exemption as a grounds for the preemption of a state tax. A state's authority to tax an on-reservation non-Indian transaction was not, however, premised on the presence of any marketing of a tax exemption. The court of appeals correctly noted that if the Arizona tax is disallowed there is nothing to prevent the Community from later reducing its own tax to attract business, and that *Colville's* reasoning depended on whether the products sold are of Indian origin. *Salt River*, 50 F.3d at 738; Petition, App. 9a.

The Community fails to accept that the primary factors in the balancing of interests in this case have to be that the buyers and sellers are non-Indians, and the goods and services sold are of non-Indian origin. The Reservation is the location of these transactions, but neither the Community nor its members are actively involved in the operations of the taxed businesses. While the court of appeals considered the federal and tribal interests involved, those interests pale against the overwhelmingly non-Indian nature of the taxed activities. The court of appeals correctly applied this Court's precedents, and upheld the Arizona taxes.

B. A State Tax On Non-Indian Transactions Is Not Preempted Because A Tribe Seeks To Tax The Same Transaction.

The Community's only revenue from the mall is from the imposition of its own tax on sales there. Its essential claim is that the Arizona tax interferes with its ability to increase its tax because the total tax burden on transactions at the mall cannot be greater than the burden on off-reservation transactions.

This Court has held that states and tribes may both tax on-reservation transactions, and a state tax is not preempted merely because it prevents a tribe from imposing a higher tax. *Colville*, 447 U.S. at 158; *Cotton Petroleum*, 490 U.S. at 187-8. The Ninth Circuit has similarly held that a state tax is not barred because of the risk of multiple taxation. *Chemehuevi Indian Tribe v. California State Board of Equalization*, 800 F.2d 1446 (9th Cir. 1986), *cert. denied*, 481 U.S. 1051 (1987); *Crow Tribe of Indians v. State of Montana*, 650 F.2d 1104 (9th Cir. 1981); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981); *Fort Mohave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

The Community's claim ignores clear holdings of this Court that a state and tribe have concurrent taxing authority over non-Indian transactions taking place on a reservation. The Community's complaint that it cannot increase its tax on sales by non-tribal members is insufficient to support the preemption of the Arizona tax.

II. A STATE TAX ON NON-INDIAN TRANSACTIONS IS NOT BARRED BECAUSE THE STATE DISTRIBUTES PART OF ITS REVENUES TO ITS POLITICAL SUBDIVISIONS.

Before the district court, the Community argued that the State's distribution of a part of its tax receipts to its own political subdivisions, but not to Indian tribes, was discriminatory. The district court rejected this, citing the Ninth Circuit's ruling in *Chemehuevi* that tribes do not stand in relation to a state in the same way as a local municipal government. Petition, App. 20a.

In the court of appeals, the Community argued the taxes were preempted by federal law because a portion of the receipts were distributed to political subdivisions. The court of appeals specifically noted in its opinion that the Community had abandoned its claim of discriminatory allocation of tax revenues. *Salt River*, 50 F.3d at 736, n.3; Petition, App. 4a. The court of appeals did not separately address the Community's preemption argument, apparently believing that it was not properly before it because the argument had not been raised below, or that it was subsumed within the general preemption issue. The court did reject the essential point of the Community's argument, however, when it rejected "the Community's claim that it is entitled to a proportionate share of the State's receipts." *Salt River*, 50 F.3d at 737; Petition, App. 8a.

The Community's main complaint appears to be that State tax revenues derived from on-Reservation transactions are distributed to off-Reservation political subdivisions which do not provide services to the Reservation. In

at least two respects this assertion is not supported by the facts. The county (i) maintains roads on the Reservation and (ii) provides funds to the school district which includes the Reservation. In any event, the Community's argument is not that the State lacks authority to impose the tax, but that it loses that authority because of how it chooses to spend the money. Because the Community asserts that all of the State's collections from the Reservation are spent off-Reservation, this argument concerning distributions to political subdivisions is actually no different than the general preemption argument. For the reasons set out in its opinion, the court of appeals was correct to reject it.

The Community's argument fails for another reason. The taxed transactions involve non-Indians who live outside the Reservation, within cities and counties which receive funds from the State. Tax revenues distributed to the cities and counties are used to provide services to the very persons who pay the tax. While the taxed transactions may take place on the Reservation, the majority of governmental services used by those taxpayers are provided by the State and its political subdivisions. There is no federal bar to a state distributing its tax revenues in this manner.

III. THIS CASE HAS NO ISSUE CONCERNING THE SCOPE OF THE INDIAN COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Community argues in its Petition that the court of appeals' "opinion does not mention the petitioner's Indian Commerce challenge to the State's taxation of

reservation activities for the exclusive benefit of its cities and towns." Petition at 5. The Court need not address this issue, however, because the Community did not raise the issue with the court of appeals. The Community never cited to the Indian Commerce Clause, U.S. Constitution, Article 1, § 8, cl. 3, in its briefs before the court of appeals. Therefore, it is not properly before this Court.

In any event, the Community's assertion is not accurate. In rejecting the Community's claim that it is entitled to a proportionate share of the State's receipts, the court of appeals cited its earlier ruling in *Chemehuevi*, 800 F.2d at 1450, which it parenthetically described as "stating that 'the failure of the state to include the Tribe in its revenue sharing program does not invalidate the state tax' under the Indian Commerce Clause." *Salt River*, 50 F.3d at 738; Petition, App. 8a. This understanding of the limited applicability of the Indian Commerce Clause is consistent with this Court's holding in *Colville* that the Clause has a "limited role to play in preventing undue discrimination against, or burdens on, Indian commerce." 447 U.S. at 157. The Arizona taxes are applied in a nondiscriminatory manner to all transactions within the State. There is no violation of the Indian Commerce Clause.

IV. THIS CASE PRESENTS NO SPECIAL REASON FOR DISCRETIONARY REVIEW.

The Community's Petition presents no special reason for this Court to exercise its discretion by granting review. None of the reasons this Court has included in its rules as justifying review are present here. *See* Supreme Court Rule 10.1. The court of appeals' decision follows

the precedents of this Court, and is not in conflict with the decisions of other circuits or any state court of last resort. There is no special and important reason for this Court to review the considered opinion of the Ninth Circuit.

CONCLUSION

Federal preemption does not prevent a state from taxing retail sales to non-members of an Indian tribe by non-Indian retailers doing business at a non-Indian owned and operated shopping center located on an Indian reservation, nor does it bar a state tax because the state distributes part of the tax proceeds to its political subdivisions. The petition for writ of certiorari should be denied.

Respectfully submitted,

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